

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

November 30, 2005 Session

SUSAN V. CESPEDES v. SODEXHO MARRIOTT SERVICES, INC., ET AL.

**Direct Appeal from the Circuit Court for Washington County
No. 04088 Donald P. Harris, Judge**

**No. M2005-00284-WC-R3-CV - Mailed - April 10, 2006
Filed - June 22, 2006**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the supreme court of findings of fact and conclusions of law. The employee appeals the trial court's finding that the preponderance of the evidence failed to prove that the work accident caused the injury to her lower back. The judgment of the trial court is affirmed.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court
Affirmed**

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and ROBERT EWING CORLEW, III, SP. J., joined.

Phillip R. Newman, Franklin, Tennessee, for appellant, Susan V. Cespedes.

Richard C. Mangelsdorf Jr., Nashville, Tennessee, for appellees, Sodexo Marriott Services, Inc., Sodexo, Inc., and Insurance Co. of the State of Pennsylvania.

MEMORANDUM OPINION

This action was filed by Ms. Cespedes [hereinafter "Plaintiff"] claiming benefits for asserted total disability as a result of a ruptured intervertebral disc allegedly suffered in a fall on June 29, 1999 during the course of her employment as a maintenance worker and cashier.

She was cleaning a kitchen floor when she fell, and was taken to an emergency room by a fellow employee. Her right hand and lower back were affected. She twice fell on the same day, but claims injury only from the second fall. She returned to work the following day, and continued to work until September 30, 1999 when she was terminated for unrelated disciplinary reasons.

Plaintiff was seen and treated at the Vanderbilt Health Services Clinic on July 7 and 14, 1999, and thereafter by Dr. Paul Thomas on July 20, 1999. She kept no further appointments with Dr. Thomas.

On March 20, 2000 she was taken to the Williamson Medical Center where she was diagnosed as having a ruptured disc. Dr. Thomas O'Brien performed surgery. The Plaintiff says that as a result of the injury she suffered by falling, and the subsequent surgery, she is totally and permanently disabled. The trial judge disagreed, finding that the Plaintiff failed to prove by a preponderance of the evidence that the accident of June 29, 1999 caused the injury to her lower back.

The Plaintiff appeals and presents for review the issue of whether the court erred in dismissing the complaint. Our review is de novo on the record with a presumption that the judgment is correct. Tenn. R. App. P. 13(d); Tenn. Code Ann. § 50-6-225(e)(2).

The Plaintiff testified at length about her background, her family, and the various jobs she has held since coming to the United States from Chile when she was fourteen years old. At the time of trial she was forty-one. She speaks and understands English, although Spanish is her preferred language. She worked at the cafeteria operated by the Defendant on June 29, 1999. She fell twice that day, stating that she injured her back the second time. From that point forward the evidence is markedly conflicting. The Plaintiff's testimony appears to have been inconsistent in various material instances.

The party claiming benefits under the Worker's Compensation Act has the burden of proof to establish his or her claim by a preponderance of the evidence. *Roark v. Liberty Mut. Ins. Co.*, 793 S.W.2d 932, 934 (Tenn. 1990). We are required to complete an independent examination, in depth, of a trial court's factual findings in order to determine where the preponderance of evidence lies. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 675 (Tenn. 1991).

Betty Jean Gay was a fellow employee. Ms. Gay testified that the Plaintiff returned within a day or two of her fall on June 29, 1999 and worked with no difficulty. She described the Plaintiff's work as including cleaning out an ice cream machine, the drink machines, and the front area, which involved climbing a ladder, bending and some lifting. Ms. Gay testified that although she and the Plaintiff regularly discussed personal and health issues, the Plaintiff never informed Ms. Gay that she had injured her back on June 29, 1999, but did mention that her back would hurt prior to June 29, 1999.

Dorothy Cannon, another fellow employee, testified that in 1999 Plaintiff had discussed injuring her hand when she fell but made no mention that she had hurt her back. She also testified that the Plaintiff had only complained about her back before the fall.

Charles Beasley, the Plaintiff's supervisor, talked to her about her fall on June 29, 1999. She reported only to have hurt her arm. She made no indication to Mr. Beasley of any injury to her lower back or tailbone as a result of her fall on June 29, 1999. He testified that he observed the Plaintiff

doing her job as she always had without difficulty, and that her duties including breaking down and cleaning an ice machine, restocking an area with cups, napkins and forks, brewing two and a half gallon urns of tea, moving the urns around, and scrubbing the floors.

The Plaintiff was disciplined with written warnings on occasion due to overages and shortages in her cash register. The Plaintiff was terminated because she left large bills on top of her cash register and failed an audit of her cash register. Ms. Beasley testified that the decision to terminate the Plaintiff was made by the company's human resources department following an investigation.

The Medical Evidence

The Plaintiff was seen by orthopedic surgeon, Dr. Paul Thomas, on July 20, 1999. She provided a history of falling three weeks earlier and injuring her right wrist, which he was able to verify. He was concerned about a possible occult fracture and placed the Plaintiff's right wrist in a cast and asked that she follow up in three weeks. On the initial visit, he did not examine the Plaintiff's lower back area because she made no complaints as to having any back pain. Further, the Plaintiff filled out a form entitled "New Patient History" which questions a new patient as to the reason for the visit. The Plaintiff's response to this question addressed only her *right wrist*. Dr. Thomas found no causal connection between the Plaintiff's reported fall at work and her herniated lumbar disc.

Dr. Thomas studied the emergency room record of Woodrow Wilson, M.D. who treated the Plaintiff in the emergency room on the day of her accident. He noted that the E.R. physician indicated the patient slipped and fell onto her right arm and shoulder, then landed on her knees.

On March 20, 2000, the Plaintiff saw Dr. Thomas O'Brien on a consultation basis at Williamson Medical Center. She had been admitted to Williamson Medical Center with complaints of low back and leg pain with neurologic symptoms consisting of loss of bowel control. An MRI scan was performed which revealed an extremely large disc herniation at L5-S1 that tightly compressed the nerve roots. Because the size of the herniation was causing an impediment to motor function and bladder function, it was Dr. O'Brien's opinion that emergency surgery was necessary. The procedure Dr. O'Brien performed on the Plaintiff's lumbar spine involved removing the very large piece of protruding disc that was causing compression of the nerves. Dr. O'Brien stated that he distinctly remembers the Plaintiff's surgery because it was one of the largest disc herniation ruptures that he had treated in his seven years of private practice as a spinal surgeon.

Before surgery, Dr. O'Brien took a history from the Plaintiff and her husband to determine and evaluate what led to the symptoms. The history provided that the Plaintiff had three and a half weeks of low back pain *with no traumatic incident*. It was Dr. O'Brien's opinion that the lumbar spine injury for which he surgically treated the Plaintiff *was not related to the Plaintiff's on the job injury*. Dr. O'Brien not only based this opinion on the history the Plaintiff provided and the review of Dr. Thomas' records that made no mention of any back pain, but also on his experience with

severe disc disruptions that are close to temporal association and relationship to complaints of back pain. There was a hiatus of nine months between the Plaintiff's incident at Sodexo and the surgery. Dr. O'Brien concluded they were not interrelated.

Dr. O'Brien was shown a treatment note dated July 7, 1999 from Vanderbilt Health Services. He found that although the note reflected a complaint of the Plaintiff's "tailbone hurting," no physical or neurologic examination was made of the low back and assessment was of the right hand injury. He further noted that the tailbone is the coccyx and distinctly different from the low back or lumbar spine. He was also shown a Vanderbilt Health Services treatment note dated July 14, 1999, and again found it primarily addressed the right upper extremity and only mentioned the Plaintiff's tailbone. He noted that the examination and assessment were to the right and with a secondary assessment of a contusion to the coccyx, which is about a foot away, distinctly removed and not anatomically related to L5-S1 of the lumbar spine.

Dr. David W. Gaw saw the Plaintiff on April 3, 2002 to perform an Independent Medical Examination (IME). He opined that the Plaintiff's fall on June 29, 1999 was the most likely cause of the Plaintiff's injuries and subsequent surgeries, basing his opinion of causation on the history provided by the Plaintiff. He conceded that significant other history indicated the fall at work in June of 1999 was *not* the cause, and noted that the histories of other physicians did not mention back pain at the time of the fall, particularly the treatment records of Dr. Paul Thomas which indicated only an injury to the right wrist. He testified that had the Plaintiff suffered a ruptured disc on June 29, 1999, she would have been complaining of severe leg pain. He acknowledged that the Williamson Medical Center admission report of March 20, 2000 indicated complaints of low back pain for three and a half weeks with no traumatic incident, and that these records were inconsistent with the history provided by the Plaintiff. Dr. Gaw bases causation on what he is told by a patient, and he does not question a patient's integrity, stating that if what he had been told by the Plaintiff was true, he would relate it but if it was not true, it would not be related. He conceded that the history provided by the Plaintiff was completely contradicted by the medical records that documented her course of treatment after her fall.

Tennessee Code Annotated section 50-6-102(13) requires that an injury must "arise out of and in the course of employment" to be compensable under the Workers' Compensation Act. The trial judge found that the Plaintiff failed to prove by a preponderance of the evidence that the accident of June 29, 1999 caused the injury to her lower back. The evidence clearly does not preponderate against this finding, and the judgment of the trial court is affirmed. Costs are taxed to the Appellant.

WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

SUSAN V. CESPEDES v. SODEXHO MARRIOTT SERVICES, INC., ET AL.

**Circuit Court for Washington County
No. 04088**

No. M2005-00284-SC-WCM-CV - Filed - June 22, 2006

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Susan V. Cespedes pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to the appellant, Susan V. Cespedes, and her surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Clark, J., not participating



Supreme Court
State of Tennessee

CHIEF JUSTICE
WILLIAM M. BARKER

JUSTICES

E. RILEY ANDERSON
ADOLPHO A. BIRCH, JR.
JANICE M. HOLDER
CORNELIA A. CLARK

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MEMORANDUM
(via e-mail)

TO: Sandra Vance, Deputy Clerk - Nashville

FROM: Justice Riley Anderson

RE: Susan V. Cespedes v. Sodexo Marriott Services, Inc., et al.
Appeal No. M2005-00284-SC-WCM-CV
(Williamson Circuit No. 04088)

DATE: June 22, 2006

WORKERS COMP MOTION FOR REVIEW: **Denied**

DISPOSITION OF RECORD: **Previously returned**